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Haynes and Boone, LLP IP Section 2323 Victory Avenue SUITE 700 Dallas, TX 75219			RICHMAN, GLENN E	
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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* GARY A. FREEMAN and DAVID H. FREEMAN

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Appeal 2009-004629  
Application 09/689,305  
Technology Center 3700

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Decided: September 11, 2009

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Before ERIC GRIMES, MELANIE L. MCCOLLUM, and JEFFREY N. FREDMAN, *Administrative Patent Judges*.

MCCOLLUM, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 involving claims to a wearable article of clothing comprising a flexible strap. The Examiner has rejected the claims as anticipated. We have jurisdiction under 35 U.S.C. § 6(b). We reverse.

STATEMENT OF THE CASE

Claims 13-17 are pending and on appeal (App. Br. 6). We will focus on claim 13, which reads as follows:

13. A wearable article of clothing, comprising: a flexible strap configured and sized to secure onto a wearer, the flexible strap comprising a non-woven holographic layer covering at least a portion of the strap's visible exterior surface.

Claims 13-17 stand rejected under 35 U.S.C. § 102(e) as anticipated by Jachimowicz (US 6,096,666, Aug. 1, 2000) (Ans. 3).

Appellants contend that Jachimowicz does not disclose the following limitations of claim 13: “flexible strap,” “sized to secure onto a wearer,” and “non-woven” (App. Br. 11).

#### ISSUE

Did the Examiner err in finding that Jachimowicz discloses the flexible strap of claim 13?

#### FINDINGS OF FACT

1. Jachimowicz discloses “a textile fiber that selectively absorbs and reflects different wavelengths of light” (Jachimowicz, col. 2, ll. 17-19).

2. Jachimowicz also discloses that a “plurality of these textile fibers in combination form a holographic textile fabric” (*id.* at col. 2, ll. 19-22).

3. In addition, Jachimowicz discloses that “[h]olographic textile fibers can be utilized as clothing fibers” (*id.* at col. 2, 1. 48).

4. Jachimowicz also discloses that the holographic textile “fiber 30 includes a light absorbing central core 32, [such as a black thread,] surround[ed] by a plurality of layers of optical media material having varying indices of refraction” (*id.* at col. 3, ll. 25-32).

5. In addition, Jachimowicz discloses that, “when light absorbing central core 32 is composed of a black thread, the black thread consists of a

plurality of threads, twisted so as to form a single thread” and that the optical layers “can also be formed so as to twist around light absorbing central core 32, generally forming a single twisted textile fiber” (*id.* at col. 3, ll. 37-43).

6. Jachimowicz also discloses that the fibers “can be interwoven into a textile fabric” (*id.* at col. 4, ll. 23-26).

#### PRINCIPLES OF LAW

“A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference.” *Verdegaal Bros., Inc. v. Union Oil Co. of California*, 814 F.2d 628, 631 (Fed. Cir. 1987).

“Inherency may not be established by probabilities or possibilities. The mere fact that a certain thing may result from a given set of circumstances is not sufficient to establish inherency.” *Scaltech Inc. v. Retec/Tetra L.L.C.*, 178 F.3d 1378, 1384 (Fed. Cir. 1999).

#### ANALYSIS

The Examiner finds that “Jachimowicz repeats only ‘interwoven’ and just twice, stating the fibers ‘can be interwoven’. Inherently, since the fibers ‘can be’ interwoven, and the patent does not discuss woven, or interwoven further, the fibers are non-woven as claimed.” (Ans. 4.) We are not persuaded.

Jachimowicz discloses “a textile fiber that selectively absorbs and reflects different wavelengths of light” (Finding of Fact (FF) 1). Jachimowicz does not disclose that these fibers are formed by being woven (*see* FF 5). However, the Examiner has not set forth a *prima facie* case that

the fibers themselves meet the other limitations of the flexible strap of claim 13.

Jachimowicz also discloses that a “plurality of these textile fibers in combination form a holographic textile fabric” and that the fibers “can be interwoven into a textile fabric” (FF 2 & 6). However, a teaching that fibers “can be interwoven” does not inherently disclose a non-woven fabric.

The Examiner also finds that Jachimowicz discloses clothing and that “it is inherent that a strap falls into the category of clothing” (Ans. 5). We are not persuaded.

Jachimowicz discloses that “[h]olographic textile fibers can be utilized as clothing fibers” (FF 3). However, the Examiner has not pointed to any teaching in Jachimowicz of a strap. That a strap falls within the broad category of clothing is insufficient to establish inherency. The rejection is an anticipation rejection, not an obviousness rejection, and therefore a strap, or something which inherently satisfies the requirements of a strap, must be disclosed to properly anticipate.

#### CONCLUSION

The Examiner erred in finding that Jachimowicz discloses the flexible strap of claim 13. We therefore reverse the anticipation rejection of claim 13 and of claims 14-17, which depend from claim 13.

Appeal 2009-004629  
Application 09/689,305

REVERSED

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